The Employment Rights Bill: a closer look at the equality law provisions

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the third article in our series analysing the Bill, we consider the proposals for equality law reform.

Running to more than 150 pages, the **Employment Rights Bill** (**the Bill**)puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the third in our series of articles explaining the Bill, we consider all the proposals in the equality sphere.

Sexual harassment

From 26 October 2024, all employers must take reasonable steps to prevent sexual harassment at work. Where this duty is breached, an uplift of 25% may be applied to compensation in relevant claims, and the Equality and Human Rights Commission (the **EHRC**) will have the power to investigate and take enforcement action. Initially, the plan was for this duty to require employers to take *all* reasonable steps, however, the word "all" was eventually dropped on the basis that it would be too onerous for employers. You can find out more about the duty in our recent webinar **here**.

The Bill provides that the word "all" will be reintroduced, meaning that employers will be required to take every possible reasonable step to prevent sexual harassment, or risk a compensation uplift and EHRC action. Separately, the Bill provides that regulations may be introduced specifying the steps that are to be regarded as reasonable for the purposes of both the new duty to prevent sexual harassment and the existing reasonable steps defence. The Bill states that this may include steps such as carrying out risk assessments, publishing plans or policies, and steps relating to the reporting and handling of complaints. Currently, the recommended steps to prevent sexual harassment are set out in the EHRC's non-statutory **Technical Guidance on Sexual Harassment and Harassment at Work** and its **8-step Guide to Preventing Sexual Harassment at Work**.

In addition, the Bill provides that disclosures about actual or likely sexual harassment will be listed as one of the types of malpractice about which a whistleblowing disclosure may be made.

What will these changes mean for employers in practice?

- It will be harder for employers to discharge the duty to prevent sexual harassment once it has been enhanced in this way. In particular, a lot will be expected from large and well-resourced employers and from employers where sexual harassment is especially prevalent. That said, the proposal to set out a list of reasonable steps in regulations will be helpful in that it gives employers legal certainty about the steps required.

- Although it will be some time before these changes to come into force (the Government has suggested not until 2026), employers would be wise to begin working towards taking all reasonable steps now. Not only will this help employers be ready for the raised requirement in good time, it opens up the possibility of pleading the "all reasonable steps defence" in relevant sexual harassment claims.

- We are likely to see an increase in employers pleading the "all reasonable steps defence" in relevant cases. Given that the work that will have gone in to take steps to discharge the duty, employers are likely to want the added benefit of avoiding liability for a sexual harassment claim.

- Making it clear that disclosures about sexual harassment may amount to whistleblowing disclosures is helpful, although arguably unnecessary. The Tribunals have already made it clear that disclosures about sexual harassment are capable of amounting to whistleblowing disclosures, since they represent breaches of the Equality Act 2010 (see for example Mysakowski v Broxborn Bottlers Ltd). Nonetheless, it is a helpful sign to those wishing to report sexual harassment that they may be protected as whistleblowers.

Discriminatory harassment by third parties

Until October 2013, the Equality Act 2010 contained provisions making employers liable for harassment of staff by third parties, albeit that liability only arose where the worker had been harassed more than once. These provisions were repealed by the Coalition Government on 1 October 2013, with the result that it became much more difficult for workers to bring claims against their employer where they had been harassed by a third party. Currently, the only way in which an employer attracts liability is in respect of its *own* actions.

The Bill will reintroduce employer's liability for third party harassment. Importantly, this will extend to harassment for *all* protected characteristics under the Equality Act, not just sexual harassment, and liability will arise from the first instance of harassment. For example if a shopworker was racially abused by a customer, the employer would potentially be liable. However, employers will be able to avoid liability where they can show they took "all reasonable steps" to prevent the harassment.

What will these changes mean for employers in practice?

- The reintroduction of liability for third party harassment is one of the most important reforms in the Bill, significantly widening an employer's exposure to claims of discriminatory harassment. For employers operating in sectors where staff frequently come into contact with third parties (such as the transport, retail and hospitality sectors), that risk is heightened further. While the "all reasonable steps" defence

remains open to an employer to defend such a claim, it will be an onerous task to discharge every possible reasonable step and many employers are likely to fall short. For this reason, employers may wish to begin work on scoping out how it might meet this standard sooner rather than later.

- As far as sexual harassment is concerned, employers who are found liable for third party sexual harassment may also face the prospect of an uplift to compensation of up to 25%. A Tribunal may award this where it finds that the employer has breached the duty to prevent sexual harassment.

Gender pay gap reporting and the menopause

Currently, employers with 250 or more employees are required to publish gender pay information on an annual basis. However, in-scope employers must report their pay gap figures and nothing else – they are not required to explain the figures nor how they intend to close their gender pay gap (and, in fact, they are not required to close it all). The hope was simply that "what gets measured gets managed" and reporting alone would drive employers to take steps to close their gaps. However, progress in closing gender pay gaps remains slow.

The Bill provides that regulations may be published requiring employers with 250 or more employees to develop and publish "equality actions plans" on an annual basis. The equality actions plans must set out the steps the employer is taking in relation to addressing its gender pay gap and to supporting employees going through the menopause. The action plan will have to meet the minimum standards to be set out in regulations. There will be consequences for failure to comply, but, again, this will be dealt with in regulations.

Further, when reporting their gender pay gaps, employers will be required to set out the identity of any person it contracts with for the supply of outsourced workers. Such workers are not employees of the employer and, therefore, do not need to be included in the gender pay gap figures. It seems that the intention here is to allow a fuller understanding of an organisation's gender pay gap. For example, if an organisation's outsourced roles were typically fulfilled by low-paid female workers, this would have the effect of improving the gender pay gap figures since this pay data would not need to be factored in.

What will these changes mean for employers in practice?

- Gender pay gap reporting will become more onerous for in-scope employers. Although some employers already publish sophisticated narratives and actions plans, many do not. All will need to publish an annual plan setting out what action is being taken to close the gap. A failure to do so will have consequences, but what is not clear is whether there will be consequences for publishing a compliant plan and then not implementing it, or attempting to implement it but failing to make a

dent in the gender pay gap.

- The Government had promised to introduce both ethnicity and disability payreporting which would mirror the gender pay gap reporting regime. These proposals are not included in the Bill. However, in the separately-published Next Steps to Make Work Pay it is stated that this commitment will be delivered via the Equality (Race and Disability) Bill. The Government says it will begin consulting on that in due course, with a draft Bill to be published during this Parliamentary session for pre-legislative scrutiny. Further consultation will also take place prior to the making of regulations implementing these reforms. In other words, it is going to be some time before either of these promises come to pass.

- The forthcoming requirement to publish information about the steps taken to support menopausal workers means employers will need to give thought to what it is able to say in this regard. Some employers are well advanced in terms of support offered. Others will need to start work on providing appropriate support measures in order to be able to populate the action plan. That said, most employers will already have some things to say here, for example, the provision of flexible working options and relevant benefits such as discounted gym memberships or employee assistance programmes. However, more is likely to be needed.

What are the next steps?

The Bill has just started its passage through Parliament, which will take time. Even when passed, the various equality provisions will not come in straight away. For example, regulations are needed for the reforms to the duty to prevent sexual harassment and to the gender pay gap reporting regime. And it is likely that there will be consultations on some of the proposals, although it is not yet clear which ones.

Separately, the Next Steps to Make Work Pay document promises to deliver ethnicity and disability pay reporting by way of a different Bill, which will also extend the current equal pay regime to claims based on ethnicity and disability and also provide for a new regulatory enforcement unit for equal pay. The Government also says it will produce new menopause guidance for employers.

Interestingly, no mention is made of the pre-election promise to enact the dual discrimination provisions in the Equality Act 2010, which would allow employees to claim discrimination on the basis of the particular combination of two protected characteristics. It remains to be seen whether this will be taken forward.

Stay tuned for our fourth article in the series, where we will consider the provisions of the Bill affecting contracts and pay.

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